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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

KRISTEN AUTRY, Plaintiff and Appellant, v. VILLA RIVIERA CONDOMINIUM ASSOCIATION, Defendant and Respondent.	B201699 (Los Angeles County Super. Ct. No. NC038837)

APPEAL from an order of the Superior Court of Los Angeles County. Tracy Grant, Judge. Affirmed.

William McKinnon for Plaintiff and Appellant.

Law Offices of Laura J. Snoke and Laura J. Snoke for Defendant and Respondent.

Kristen Autry (Autry) appeals the trial court's order awarding attorney fees to respondent Villa Riviera Condominium Association (Association)[1] pursuant to Civil Code section 1354, subdivision (c).[2]

We find no error and affirm.

FACTS

The complaint

Autry sued the Association, alleging: The Association's secretary received a petition from members of the Association (petitioners) seeking a special meeting to remove Autry as director. Under the Association's bylaws (bylaws), section 4.8, a director may be removed from office by a vote of the members representing 60 percent of the total voting power of the Association. Any director whose removal is being sought has a right to be heard at the meeting. If a director is removed, a new director shall be elected at the same meeting. Section 3.4 of the bylaws requires the secretary to provide notice of a special meeting.

The secretary, over objection by certain members, mailed notice (first notice) that the special meeting would take place on October 13, 2006. The petitioners mailed their own notice (second notice), setting the special meeting earlier. There was no authority for the second notice.

Not only was the second notice unauthorized, it was defective because: (1) it was fraudulently dated; (2) the petitioners identified themselves as a recall committee even though no such committee was established through the procedures set forth in section 4.15 of the bylaws; (3) the second notice provided for mail ballots, but section 4.8 of the bylaws prohibits mail ballots for recall votes; and (4) the petitioners used Association stationary for the notice, thereby falsely implying that the Association supported the recall efforts.

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1 The Association is a nonprofit corporation. It has 134 units.

2 All further statutory references are to the Civil Code unless otherwise indicated.

The petitioners sent a third notice and a fourth notice. The fourth notice stated that Corporations Code section 7222, subdivision (a)(2) provided that a director can be removed without cause if the removal was approved by the members as defined in Corporations Code section 5034. Under that statute, "approval by (or approval of) the members" is a majority vote of the votes represented and voting at a meeting at which a quorum is present. Under bylaws, section 2.3, a quorum of the Association is the presence of persons or proxies representing 51 percent of the membership's voting power. The fourth notice attempted to reduce the number of votes to remove a director from 60 percent to 26 percent, a majority of a quorum.

Autry requested an order enjoining the petitioners from holding a special meeting, from removing Autry as director unless they obtained a vote of 60 percent or greater of the members' total voting power.

Additionally, Autry sought a declaration that mail ballots are not permissible and that Corporations Code sections 7222 and 7151, subdivision (e) do not prohibit the Association from adopting a higher voting standard than a majority of a quorum to remove a director from office.

The September 22, 2006, hearing

Autry filed an ex parte application for an order to show cause why the special meeting noticed by the petitioners should not be enjoined and why the Association should not be enjoined from removing Autry as director unless it was upon a vote of 60 percent or more of the total membership.

The trial court found that the notices provided by the secretary and the petitioners were invalid and set the special meeting for October 26, 2006. It declined to rule on whether there was conflict between the Corporations Code and the bylaws until a vote actually took place.

The December 7, 2006, hearing

After Autry was removed from office by a majority vote of members attending the special meeting and sending mail in ballots, Autry filed an ex parte application for an order to show cause for an injunction. She argued that a quorum was not present at the

special meeting, and that various irregularities in the voting process rendered her removal void.

The trial court upheld Autry's removal.

The dismissal; the award of attorney fees

Autry dismissed her action on January 19, 2007.

The Association moved for attorney fees and costs pursuant to section 1354, subdivision (c).

In opposition, Autry argued that her request for declaratory relief fell under section 1363.09. Under that statute, a prevailing association cannot recover costs unless the action was frivolous. Autry argued that her action was not frivolous because the law was unclear. The bylaws required a vote of 60 percent or more of the membership for a recall. Though Corporations Code sections 7222 and 5034 appeared to legitimize the recall vote because they allowed a recall based on a majority of a quorum, they possibly conflicted with *Peak Investments v. South Peak Homeowners Assn., Inc.* (2006) 140 Cal.App.4th 1363. That case appeared "to suggest that . . . a super majority provision will prevail until such time as the members of the association expressly revoke it."

The trial court granted the Association's motion and awarded it attorney fees and costs in the amount of $34,574.43. It stated: "Upon entry of the plaintiff's dismissal[,] the defendant is entitled to recover court costs incurred up to the date of dismissal. Items that are recoverable are set forth in [section] 1033.5 of the Code of Civil Procedure. The prevailing party in a suit to enforce the governing documents of [a] common interest development is entitled to recover the fees pursuant to [section] 1354[, subdivision (c)] and [a] voluntary dismissal does not prevent [the trial court] from assessing attorney's fees. [¶] The Association is correct that [section] 1363.09 does not apply. This article . . . concerns statutory nomination and election procedures not . . . a recall of a director. [¶] . . . [¶] [Autry's] first cause of action sought to enjoin the petitioners from holding a special meeting of the Association to remove [Autry] as a director on [September 26, 2006,] or any continued date thereafter and, secondly, to enjoin the Association from removing [Autry] as director save and except that a motion to remove her shall obtain a

minimum of 60 percent or greater affirmative vote of the total voting power of the Association. [¶] Second cause of action sought declaratory relief . . . that mail ballots are not [a] permissible mechanism for the removal of an Association director pursuant to [bylaws, section] 4.8 and . . . Corporations Code [sections] 7222 and 7151[, subdivision (e)] do not prohibit the Association from adopting a higher voting standard than a majority of [a] quorum to remove a director.

"The [trial court] allowed the special meeting to occur. The meeting was held and [Autry] was recalled as a director. [¶] The [trial court] further upheld that the recall based upon the statutory language requiring a majority of a quorum of members to affirmatively vote at a meeting[,] . . . not as prayed for by [Autry] by a super majority of 60 percent of the entire membership, thus the Association clearly realized its litigation objectives and [Autry] did not. Therefore, the Association would be the prevailing party and would be entitled to . . . attorney's fees and costs. [¶] The [trial court] used the lodestar method and calculated from a compilation of time reasonably spent and reasonable hourly compensation of each attorney and the breakdown was 101.9 hours for [Adams & Kessler] for fees, $2,708.92, [Adams & Kessler] costs. [Laura J. Snoke's] fees, ten hours at [$]275 for [$]2,750; [Laura J. Snoke] costs at [$]359.51 for a total of [$]34,574.43."

This timely appeal followed.

STANDARD OF REVIEW

The issues of law presented by this appeal are subject to our independent review. (*Harustak v. Wilkins* (2000) 84 Cal.App.4th 208, 212.) Factual findings are upheld if they are supported by substantial evidence. (*Bluehawk v. Continental Ins. Co.* (1996) 50 Cal.App.4th 1126, 1130–1131 .)

DISCUSSION

Autry contends that the trial court erred in failing to apply section 1363.09; it erred when it determined that the Association was the prevailing party; it erred by failing to make findings before awarding attorney fees; and it erred when it ruled that the 2007

changes in section 1350 et seq.[3] replaced the super majority voting provisions in the bylaws. We find no basis for reversal.

1. The Association was the prevailing party under section 1354.

One of the owners of a common interest development may enforce a recorded declaration which is intended to be an equitable servitude, or any other governing document. (§ 1354, subd. (a) & (b).) "In an action to enforce the governing documents, the prevailing party shall be awarded reasonable attorney's fees and costs." (§ 1354, subd. (c).) We previously noted that a prevailing party is one who prevailed on a "'practical level.'" (*Parrott v. Mooring Townhomes Assn., Inc.* (2003) 112 Cal.App.4th 873, 877.)

Autry sued the Association to enjoin it from holding a special meeting to remove her and from removing her as a director; to enjoin it from removing her without a super majority vote; for a declaration establishing that mailed ballots cannot be counted in a recall; and a declaration that the bylaws supersede contrary statutes in the Corporations Code. Based on the foregoing, Autry sued the Association to enforce its bylaws, i.e., she attempted to enforce notice procedures, voting procedures and the super majority requirement for recalls. It is clear that the Association's motion for attorney fees and costs was controlled by section 1354.

We reject Autry's contention that she is not liable for attorney fees and costs unless her action was frivolous, unreasonable or without foundation within the meaning of section 1363.09, subdivision (b).

Section 1363.09, subdivision (a) provides that a member of an association "may bring a civil action for declaratory or equitable relief for a violation of this article by an association." The article (article 2, chapter 3 of the Davis-Stirling Act (article 2)) pertains to elections and meetings in common interest developments. Autry did not allege a violation of article 2 in her complaint, nor did she identify a violation of article 2

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[3] Section 1350 et seq. is known as the Davis-Stirling Common Interest Development Act (Davis-Stirling Act).

in her opening brief. As a result, this argument has been waived. (*Tan v. California Fed. Sav. & Loan Assn.* (1983) 140 Cal.App.3d 800, 811.) We note that article 2 requires an association to adopt rules and procedures for elections, it prohibits the use of association funds for campaigning, it requires open meetings (with exceptions), and it sets forth rules for a member's exclusive use of a common area. (§§ 1363.03, 1363.04, 1363.05, 1363.07.) A perusal of the issues argued both below and on appeal fails to reveal a hint of a violation of any of these statutes.

The trial court permitted the special meeting and Autry was removed as a director based on a majority of a quorum of those present and those who mailed in ballots. These facts constitute substantial evidence that the Association prevailed on a practical level in the underlying action because Autry did not achieve her ultimate goal of preserving her position as a director. Autry does not argue that the record is devoid of substantial evidence, which defeats her challenge.

Instead of arguing whether the trial court's finding was supported by substantial evidence, she argues that "different entities sought to establish different dates for an election to remove [Autry] as a director of [Association]. The [trial court] held that . . . no meeting had been properly noticed. Thereafter the [trial court] set a date for the meeting. [¶] Given these facts, it is submitted that on the first cause of action for injunctive relief [Autry] prevailed. [¶] On the declaratory relief portion of the complaint [Autry] asked the [trial court] to determine whether the super-majority provisions of the [bylaws] were trumped by statutory revisions. The [trial court] held that the majority of quorum provision of the statutes superseded the [60] percent of voting power set forth in bylaw[s] [section] 4.8. [¶] While that declaratory decision no doubt had negative ramifications for [Autry] personally, she had accomplished her litigation objective: a declaration by the [trial court] holding [bylaws, section] 4.8 was no longer valid under the revised statutory scheme. [Bylaws, section] 4.8 mandated a different result, and [bylaws, section] 9 held that [bylaws, section] 4.8 was to prevail until a court decided to the contrary. It was only by [Autry's] litigation that the Association regained clarity in its

electoral processes. Such a result should not result in an award against the party who sought and obtained the clarity."

Whether the notices sent out for the special meeting were valid was a derivative issue in the first cause of action. In other words, the validity of the notices was an issue only because Autry was being threatened with a recall. On the principal issue in the first cause of action—whether Autry could be recalled by less than a super majority vote—she lost. Further, a point of correction is in order. Autry did not seek a declaration that the Corporations Code superseded the bylaws. She sought the opposite, namely that the Association could require a super majority despite the Corporations Code. Also, she sought a declaration that mail in ballots could not be used for a recall. She lost on both counts. Her claim of victory is unavailing.

Next, Autry contends that the trial court erred "in making findings and determining a prevailing party subsequent to the dismissal of the action."

Regarding this assignment of error, Autry contends that the trial court did not have the authority to decide who prevailed in connection with the motion for attorney fees and costs. According to Autry: "Subsequent to the dismissal, at the hearing to consider the award of attorney's fees, the [trial court], without notice by any party or the [trial court], or the opportunity to brief or argue the issues, decided the remaining declaratory relief issues adversely to [Autry], and thereafter declared the [Association] to be the prevailing party. [¶] . . . [¶] While it is conceded by [Autry] that the [trial court] retained jurisdiction to consider the motion for the award of attorney's fees, it is respectfully submitted that jurisdiction did not encompass ad hoc determination of substantial issues after the filing of a voluntary dismissal."

Autry did not cite any law to support her argument. "It is not our responsibility to develop an appellant's argument." (*Alvarez v. Jacmar Pacific Pizza Corp.* (2002) 100 Cal.App.4th 1190, 1206, fn. 11.) Regardless, the trial court declined to enjoin the special meeting or negate the recall based on Autry's arguments in connection with her ex parte applications for orders to show cause. Those issues were decided before the dismissal in response to Autry's prompting. There were no ad hoc determinations without notice.

The ruling on the motion for attorney fees simply recognized both what transpired and the practical effects of it.

In her reply, Autry contends that the underlying theme of section 1354 is the promotion of alternative dispute resolution. She bases this argument on an old version of the statute with no relevance. Prior to its amendment in 2004, the statute provided: "In any action specified in subdivision (a) to enforce the governing documents, the prevailing party shall be awarded reasonable attorney's fees and costs. Upon motion by any party for attorney's fees and costs to be awarded to the prevailing party in these actions, the court, in determining the amount of the award, may consider a party's refusal to participate in alternative dispute resolution prior to the filing of the action." (Stats. 1996 ch. 1101, § 1, subd. (f).)

According to Autry: "It should be noted that at no time did the [Association] seek [alternative dispute resolution], respond to [Autry's] overtures to [alternative dispute resolution], or insist that [alternative dispute resolution] was a mandatory component of the resolution of the dispute between the parties. By its conduct[,] it is submitted the [Association] acknowledged that [Autry's] challenge was to the electoral process, and therefore not governed explicitly by [section 1354]. This position was maintained until such time as a fee award was sought, at which time the [Association] sought the advantage of the statute."

There are a plethora of problems with this argument. The argument was neither made below nor in the opening brief.[4] It cannot be raised now. (*Doers v. Golden Gate Bridge Etc. Dist.* (1979) 23 Cal.3d 180, 184–185, fn. 1 ["it is *unfair to the trial judge and to the adverse party to* take advantage of an error on appeal when it could easily have been corrected at the trial"]; *Wurzl v. Holloway* (1996) 46 Cal.App.4th 1740, 1754, fn. 1. [A point not argued in a party's opening brief is deemed to have been abandoned].)

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[4] At the hearing, Autry's counsel stated that the Association rejected alternative dispute resolution. But her counsel did not posit that this was an admission that section 1354 was inapplicable.

Further, this action was filed in 2006 and postdated the current amendment to section 1354.[5] Thus, whether the Association refused to participate in alternative dispute resolution was not a factor for the trial court to consider when awarding attorney fees. We fail to see how the Association's refusal to participate in alternative dispute resolution amounted to an admission that this action did not fall under section 1354. Autry cited no law supporting this theory.

Another argument raised for the first time in the reply brief involves statutory interpretation. According to Autry, section 1363.09 and section 1354 conflict. Therefore, because section 1363.09 is the more specific statute, it should prevail. But this argument was belatedly raised. And it lacks merit. Section 1363.09 does not cover actions to enforce a homeowner association's governing documents. Undeniably, the two statutes do not conflict.

2. The trial court's factual findings were sufficient.

When it ruled on the Association's motion for attorney fees and costs, the trial court made specific findings on the record regarding Autry's challenges to the special meeting and her removal. It found that the Association achieved its litigation objectives. As a result, the trial court concluded that the Association was the prevailing party. Moreover, the trial court shared its thoughts regarding its use of the lodestar method and how it calculated the amount of the award.

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[5] Autry attached an appendix to her reply brief. The appendix purports to contain "[t]he full text of [s]ection 1354 at the time of the underlying litigation." She sets forth the text from the 1996 amendment. She then purports to set forth "[t]he full text of the 2008 revised [s]ection 1354." Our research reveals that the statute was amended in 2004, before this litigation commenced, not in 2008. Autry did not provide a citation for a 2008 amendment.

Despite the foregoing, Autry states that the trial court failed to make findings before awarding attorney fees and costs. This contention bears no fruit. The reporter's transcript establishes that findings were made.[6]

Last, Autry cites *Rosenman v. Christenson* (2001) 91 Cal.App.4th 859, 864 (*Rosenman*), apparently to suggest that the trial court was required to determine whether she has the ability to pay attorney fees. But *Rosenman* is inapposite. It applied Government Code section 12965, which authorizes a discretionary award of attorney fees and costs to a prevailing party in any action brought under the Fair Employment and Housing Act (FEHA). When awarding attorney fees and costs to a prevailing defendant, a trial court must make written findings as to whether the plaintiff's action was frivolous, and as to the plaintiff's ability to pay. (*Rosenman, supra*, 91 Cal.App.4th at pp. 864–868.) Because Autry did not bring an action under the FEHA, the requirements set forth in *Rosenman* do not apply. Autry cited other cases, but none applied the *Rosenman* standard to section 1354.

3. Autry cannot challenge the trial court's rulings on the orders to show cause.

Autry argues that the trial court "erred in deciding that 2007 changes in the Davis-Stirling Act replaced super majority voting provisions in the [Association's] bylaws." We lack jurisdiction to entertain this issue. She appealed from the award of attorney fees and costs. She did not challenge the trial court's rulings on the orders to show cause by petition for writ of mandate or otherwise. Rather, she dismissed her action. The rulings are final.

Aside from this procedural hurdle, we find Autry's argument impossible to understand. The bylaws state that any provisions that conflict with California law are void upon "final court determination to such effect." A homeowners' association may not enforce covenants, codes and restrictions that violate statutory or common law.

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[6] This contention is inconsistent with the assertion made elsewhere in the opening brief that the trial court made findings of fact but erred.

(*Frances T. v. Village Green Owners Association* (1986) 42 Cal.3d 490, 499, fn. 6.) Corporations Code section 7222, last amended in 1999, provides that a director may be removed without cause if, in a corporation of 50 or more members, the removal is approved by the members as set forth in Corporations Code section 5034. Corporations Code section 5034, last amended in 1979, defines approval of members to mean an affirmative majority vote of a quorum. Under these statutes, the super majority requirement in the bylaws was unenforceable. Moreover, these statutes are not in the Davis-Stirling Act. Hence, we fail to comprehend what Autry means when she claims the trial court misapplied "2007 changes in the Davis-Stirling Act." We know of no such changes that are relevant to this appeal.[7]

DISPOSITION

The trial court's order awarding attorney fees and costs to the Association is affirmed. The Association shall recover its costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
ASHMANN-GERST

We concur:

_____, Acting P. J.
DOI TODD

_____, J.
CHAVEZ

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[7] All other issues raised by the parties are moot.